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No. 08-1283

Supreme Court, U.S.
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In the Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., ET AL.,
Petitioners,

v.

JESSE WHITE, SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the petition, we showed that further review is needed to bring national uniformity to the patchwork of conflicting decisions – including several intercircuit conflicts acknowledged by the courts below – that have arisen from a decade of First Amendment litigation involving "Choose Life" and other specialty license plates. Pet. 8-20, 26-30. In an effort to persuade this Court to allow that legal disarray to persist, respondent seizes on a statutory amendment made by Illinois while this case was on appeal. But that amendment merely resolved an embedded *state-law issue*; it did not vitiate the circuit conflicts. Equally unavailing are the flurry of meritless waiver, vehicle, and other arguments respondent advances. For the reasons set forth in the petition and below – and in two *amicus* briefs respondent ignores – the petition should be granted.

I. The As-Applied First Amendment Issue Warrants Review

In the petition (at 12-13, 15-17), we showed that the Seventh Circuit placed itself in direct conflict with the Ninth and Fourth Circuits by holding that Illinois had not engaged in viewpoint discrimination when the state selectively rejected the "Choose Life" plate after approving many other plates, including some bearing controversial messages. We further demonstrated (Pet. 13-14) that the Seventh Circuit's decision rested largely on a disagreement with the Ninth Circuit about the meaning of *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819 (1995), and *Rosenberger*'s demarcation of the line between viewpoint and content discrimination. We explained that the analytical approach used by the Fourth and Ninth Circuits in resolving identical as-applied challenges was dramatically different from the Seventh Circuit's approach. Pet. 16-18. And we

pointed out that further review would allow this Court to resolve conflicts and confusion in the lower courts over both (1) the nature of the specialty license plate forum, and (2) whether messages on specialty plates are private or government speech. Pet. 18-20.

Respondent repeatedly suggests that these conflicts are "manufactured" (Opp. 10, 11), but the Seventh Circuit *expressly acknowledged* that it was both creating a direct conflict with the Ninth Circuit *and* deepening an entrenched and widely acknowledged conflict with the Sixth Circuit on the private/government speech issue. Pet. App. 19a, 27a; see also *Amicus* Br. of Choose Life Int'l *et al.* ("CLI Br."), at 18 & n.5 (citing numerous commentators who have recognized these conflicts). It is respondent's efforts to deny these conflicts that turn out to be "manufactured."

1. Respondent relies heavily on a recent amendment to Illinois law. See Pet. App. 36a-38a; Pet. 3-4 & n.2. That change, however, in no way undermines petitioners' as-applied claim, which has always been that the selective refusal of Illinois to approve the "Choose Life" plate – including the General Assembly's failure to authorize it – constituted impermissible viewpoint discrimination. That selective refusal is no less viewpoint-based because the requirement of prior legislative approval is now written into a statute as opposed to set forth in an administrative policy statement. If anything, by removing the need to explore Illinois administrative law, the amendment *simplifies* this case and makes it a *cleaner* vehicle for deciding the important and recurring issues of First Amendment law presented.

Respondent is equally wrong (Opp. 11-16) that the statutory amendment renders the intercircuit conflicts illusory. In *Arizona Life Coalition, Inc.* v. *Stanton*, the Ninth Circuit squarely held that Arizona had engaged in impermissible viewpoint discrimination by selectively denying the "Choose Life" plate despite having approved a broad range of other specialty plates. 515 F.3d 956, 969-72 (2008). That is exactly what Illinois did here. And the Ninth Circuit rejected the state's argument – credited by the Seventh Circuit in this case – that there was no viewpoint discrimination because Arizona had excluded *both* sides of the controversial abortion debate from the specialty plate forum. *Id.* at 971-72. That holding turned on the Ninth Circuit's understanding of *Rosenberger* – an understanding the Seventh Circuit expressly rejected below – and not (as respondent now suggests) on whether prior legislative approval of new plates is required or whether *other* preconditions in the statute had been satisfied. See also *Amicus* Br. of Consistent Life *et al.* ("CL Br."), at 4-20 (discussing Seventh Circuit's departure from long historical tradition of protecting controversial speech).

Respondent also suggests (Opp. 11-12) that *Stanton*'s holding on viewpoint discrimination is *dicta* because the Ninth Circuit also concluded that Arizona's rejection of the "Choose Life" plate was unreasonable. But that argument overlooks the fact that the Ninth Circuit followed a defined sequence in conducting its First Amendment analysis, noting that "[t]he first step in assessing" Arizona Life Coalition's claim was to determine the "nature of the forum," then proceeding to decide whether Arizona's action was viewpoint or content discrimination, and finally addressing briefly whether rejection of the plate was reasonable. 515

F.3d at 968, 971-73. Not surprisingly, then, the Seventh Circuit treated *Stanton*'s viewpoint discrimination analysis as a clear holding and future Ninth Circuit panels no doubt will do the same. In any event, as previously explained (Pet. 18, 20, 24-25), *Stanton*'s reasonableness analysis also conflicts with the Seventh Circuit's reasonableness analysis in this case.

2. Respondent fares no better in attempting (Opp. 16-17) to deny the conflict with two decisions of the Fourth Circuit recognizing "fairly obvious instances of discrimination on account of viewpoint." Pet. App. 24a; see Pet. 15-16. As previously explained (Pet. 15), the Seventh Circuit's view that *Sons of Confederate Veterans* v. *Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) ("*SCV*"), could be distinguished because there Virginia "was not imposing a 'no flags' rule" but rather was singling out "a specific symbol commonly understood to represent a particular viewpoint" simply overlooks the fact that *Virginia itself* sought to defend the logo proscription as viewpoint neutral on the ground that it reflected a ban on *all* uses of the Confederate flag on specialty plates. Pet. 15. (Here too, Illinois has claimed that it merely enforces a ban on any plate relating to the topics of abortion or "reproductive rights.") The Fourth Circuit rejected Virginia's submission, whereas the Seventh Circuit accepted Illinois's identical argument uncritically. Respondent offers no answer to this point, and there is none.[1]

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[1] Respondent claims that Illinois's rejection of the "Choose Life" plate was not "selective," pointing to other plates he claims "the record" shows were also rejected. Opp. 4-5, 18 n.4. But respondent neglects to mention that this "evidence" was submitted for the first time in support of his motion to alter or amend the judgment -- a

3. Respondent does not deny that the Fourth and Ninth Circuits' analytical approach to the issue of viewpoint discrimination is dramatically different from the Seventh Circuit's approach. See Pet. 16-18; see also CLI Br. 10-16 (discussing divergent treatment of suppression of "controversial" speech). Nor does he dispute that there is widespread confusion in the lower courts concerning both the nature of the forum created by specialty and vanity license plates and the proper method of analyzing the issue of reasonableness. See Pet. 18-20. Regardless whether there is an explicit circuit split on these subsidiary issues, they provide an additional reason why the petition should be granted.

4. Respondent spills much ink (Opp. 32-39) disputing that further review would permit this Court to resolve the circuit conflict over whether messages on specialty license plates are private or government

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motion the district court *denied* in a ruling respondent failed to challenge on appeal. In the summary judgment proceedings, petitioners had consistently maintained that the "Choose Life" application was the *only* specialty plate to be rejected on the merits, and respondent offered no argument or evidence to the contrary. The district court accordingly determined that "[t]here is no evidence that the General Assembly has exercised its discretion in denying a specialty plate bill." Pet. App. 44a.

In the Seventh Circuit, respondent submitted a Rule 28(j) letter after oral argument inviting the court to consider the untimely "evidence" the district court had rejected. Not surprisingly, the Seventh Circuit declined to do so and made no mention of the bills cited in the 28(j) letter. See *Bowman* v. *City of Franklin*, 980 F.2d 1104, 1107 n.1 (7th Cir. 1992) (Rule 28(j) allows only for identification of additional *authority*, not new *evidence*). In any event, respondent's "evidence" appears to be nothing more than a list of pending bills that *lapsed* when the General Assembly's session *ended*, which hardly detracts from our submission that the "Choose Life" plate is the *only* one that the evidence shows was rejected on substantive grounds. Pet. App. 66a.

speech. Although respondent does not deny that he would ask this Court to resolve that issue if review is granted, he takes issue with the extent of the conflict, reverting to the now-familiar tactic of suggesting that the divergent outcomes (although recognized as such by the courts of appeals, see, *e.g.*, Pet. App. 3a & n.1, 13a, 20a) can in fact be explained by different features of the specialty plate schemes at issue that the courts of appeals failed to appreciate. Plainly, the courts of appeals do not share respondent's assumption that Illinois's delegation of authority to the General Assembly is qualitatively different from schemes where that authority rests with either an administrative agency or an executive department. Indeed, the Seventh Circuit itself appears to have rejected that assumption, which respondent vigorously pressed below. See Pet. App. 19a (describing *Stanton* as "a case very much like our own"), 21a (characterizing Illinois's scheme as similar to that used in other states).

In any event, respondent is wrong in contending that the "distinction between legislative and non-legislative approval schemes" (Opp. 34) explains the conflicting results. As even respondent admits (Opp. 35-36), this explanation cannot account for the Fourth Circuit's decisions in *SCV* and *Planned Parenthood of S.C., Inc.* v. *Rose*, 361 F.3d 786 (4th Cir. 2004). Those cases, after all, just like *ACLU of Tenn.* v. *Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006), "involved challenges to legislatively created plates." Opp. 35. Nor does respondent's distinction account for the Seventh Circuit's clear holding *in this case* that specialty-plate messages in Illinois are not government speech. Pet. App. 11a-22a. And respondent's attempt to minimize the continuing impact of the Fourth Circuit's pre-*Johanns* four-factor test on other courts (Opp. 36) is

unpersuasive given the Ninth Circuit's post-*Johanns* adoption of that test. *Stanton*, 515 F.3d at 964-65.

Respondent contends (Opp. 36-37) that review of the government/private speech issue is "premature" given *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009). But the Eighth Circuit explicitly considered *Summum*'s potential impact and concluded, correctly, that *Summum* involved a "much different issue" and thus does not alter the conclusion that specialty-plate messages are private rather than government speech. *Roach* v. *Stouffer*, 560 F.3d 860, 863-65 & 868 n.3 (8th Cir. 2009). At the very least, then, the split between the Sixth and Eighth Circuits will persist.[2]

Even if the circuit conflict could be reconciled by looking to how each state authorizes specialty plates (which it cannot), respondent has identified 18 states that, like Illinois, create specialty plates exclusively by specific legislative action (Opp. 4 n.1). Of those 18 states, nine are located in the seven circuits that have already considered this issue. See Pet. 10 & n.9.

In a final effort to muddy the waters, respondent claims (Opp. 18-19) that this case boils down to a disagreement about the factual record. That is false. It is respondent, not petitioners, who is seeking to

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[2] The Eighth Circuit's conclusion was surely correct. *Summum* did *not*, as respondent argues, "dramatically affect[] the government-speech analysis." Opp. 32, 36. Rather, this Court relied on the unique characteristics of permanent monuments placed on public property, the history of donated monuments in particular, and the limited capacity of public parks. See 129 S. Ct. at 1132-38. Nor would *Summum* apply here, any more than in *Roach*. Missouri's program was "statutorily open" in the same sense as Illinois's: Both could be closed off to a particular plate by state legislators.

remake the record in this case. See note 1, *supra*.[3] Moreover, respondent's shifting rationales for denying the "Choose Life" plate (Pet. 16-18 & n.11) – including his invention on appeal of a "policy" of excluding the "entire subject of abortion" (or "reproductive rights") – would not have been tolerated in other circuits (such as the Ninth and Fourth) that do not follow the Seventh Circuit's infinitely deferential approach. Pet. 16-17; CLI Br. 19-22.

II. The Seventh Circuit's Rejection Of Petitioners' Facial Challenge Also Warrants Review

We showed in the petition (at 26-33) that the second question presented independently warrants review because the Seventh Circuit strayed from both this Court's decision in *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), and the Eighth Circuit's decision in *Roach*, in recognizing a novel and troubling "legislative body" exception to the longstanding principle that standardless licensing authority violates the First Amendment. See also CLI

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[3] Respondent's contention that the Proft declaration was inadmissible (Opp. 18-19 & n.5) rests on several erroneous assumptions. First, the declaration *was* identified in (and was incorporated into and submitted with) petitioners' Local Rule 56.1 Statement (see Doc. 31 at ¶ 43; Doc. 33). As for the alleged violations of Fed. R. Civ. P. 26(a)(2) and F.R.E. 702, the declaration contained a factual account of Proft's conversation with, and impression of hostility from, the President of the Illinois Senate, as well as the highly unusual treatment the bill received from a House legislative committee. Pet. App. 66a-67a. It was not offered as expert testimony. In any event, respondent's objections to the declaration were raised for the first time in the motion to alter or amend the judgment and thus are waived. Compare Doc. 53, at 8 n.3, with Doc. 35 at ¶ 43.

Br. 19-22 & n.6; CL Br. 20-25. Respondent's arguments against review are all unpersuasive.

First, respondent pretends (Opp. 22) that petitioners never adequately raised the facial challenge in the district court. That is demonstrably untrue. The complaint contained a separate facial challenge that expressly targeted the absence of standards governing *both* the Secretary's *and* the General Assembly's approval decisions. See Amended Cplt. (Doc. 14), at ¶¶ 3, 23, 42-47. Petitioners clearly pressed the same argument on appeal, see Pet. C.A. Br. 42-43, as the Seventh Circuit itself acknowledged, see Pet. App. 10a n.4. Moreover, petitioners *did* bring the conflict with *Shuttlesworth* to the Seventh Circuit's attention in a rehearing petition, which the panel denied. Reh'g Pet. 11-15. Thus, the Seventh Circuit had every opportunity to consider these arguments, which were fully developed below.[4] In any event, so long as an issue was *either raised or decided* in the court of appeals, this Court has discretion to review it. *United States* v. *Williams*, 504 U.S. 36, 41, 42-43 (1992). It is undisputed that the Seventh Circuit squarely rejected petitioners' facial challenge.

Next, respondent argues (Opp. 25-29) that the decision below is not inconsistent with *Shuttlesworth* or *Roach*. Although respondent does not deny that the City Commission wielding standardless authority in *Shuttlesworth* was a legislative body, he suggests that

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[4] Although space does not permit a point-by-point response, respondent's other waiver arguments are equally groundless. Compare, *e.g.*, Opp. 23 n.7 (claiming failure to raise argument that General Assembly is exercising administrative authority in approving plates pursuant to statutory delegation) with Reh'g Pet. 15 (General Assembly is "engaged in a function that is quintessentially *administrative* in nature").

the case involved an administrative rather than a legislative function. But precisely the same is true here. Moreover, the Illinois statute as amended delegates to the General Assembly the authority to "authorize[]" new plates – whether by legislative act or otherwise. Pet. App. 8a; Pet. 3 n.2. In contrast to the respondent's "Fact Sheet," the Illinois statutory amendment does *not* require that a formal law be enacted and signed by the governor, and thus leaves open the possibility that the General Assembly could act in less formal ways.

Respondent also tries to distinguish *Roach* on similar grounds. But the fact that Missouri law includes two methods of obtaining approval of new specialty license plates, or that the parties in *Roach* took note of or mentioned that fact in their briefs, does not mean that the Illinois scheme is qualitatively different. The critical issue is whether it matters that discretionary, standardless licensing authority happens to have been delegated to the General Assembly in this case (rather than a committee whose only voting members are legislators as in Missouri). We say that is a distinction without a difference; respondent disagrees. That dispute goes to the merits of the facial challenge. Respondent cannot make the conflict disappear merely by assuming he is right on the merits. For the same reason, respondent's argument (Opp. 29-30) premised on the disputed assumption that specialty plates are a nonpublic forum also fails.

Finally, respondent argues that petitioners lack standing to pursue a facial challenge. Opp. 31-32. In contrast, the Seventh Circuit held that petitioners had "adequately alleged an injury by reason of the exclusion of their 'Choose Life' message from Illinois's specialty-plate program." Pet. App. 9a n.3. Respondent's theory

is that petitioners could not benefit from their challenge because "[e]ven if Illinois had standards to prevent discrimination against viewpoints on the topics encompassed by its specialty-plate program, those topics do not include abortion." Opp. 31. This argument begs the question of which topics are "encompassed" by the program in the first place. The lower-court cases respondent cites (Opp. 31) are readily distinguishable because they involved permit applicants who indisputably violated other unchallenged and established criteria. In any event, this Court has long recognized that overbroad prior restraints may be subject to facial challenge even where application in the instant case might be constitutionally unobjectionable. See, *e.g.*, *Forsyth County, Ga.* v. *Nationalist Movement*, 505 U.S. 123, 129 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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